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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 41

PYRAMID MOTOR FREIGHT CORP.,
Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

TO THE HONORABLE HARLAN F. STONE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

Summary Statement of Matter Involved

This is an action by Ispass and certain other former employees of Pyramid Motor Freight Corporation (an interstate general commodity motor truck common carrier) to recover claimed unpaid overtime compensation, penalties and counsel fee, as if warranted by Sections 7(a) and 16(b) of the Fair Labor Standards Act of Congress. They were "loaders" and a "helper" whose work was confined to the restricted and congested "Garment Center" of New York City in which Pyramid maintained a "sub-terminal" and near which it also parked its trucks for direct loading and unloading of freight packages, bundles and boxes to and from the garment buildings themselves.

Upon removal from the City Court of the City of New York, in which the action was filed, to the United States District Court for the Southern District of New York, that court on February 14, 1945, dismissed the action as to all the suing employees. (Reported in 54 F. Supp. 565 and 59 F. Supp. 341.)

On belated appeal proceedings the United States Circuit Court of Appeals, on December 28, 1945, sustained the judgment of dismissal as to Shapiro but reversed as to the other former employees. The court also declared that the excuses for the long delay in docketing the appeal and filing the record were "feeble" but that it would not dismiss the appeal merely because a "substantial question" was presented on the merits.

Both the trial court and the Circuit Court of Appeals dealt with the case on the basis of an agreed statement of facts which is set forth hereinafter.

Each court concluded therefrom that the former employees, other than Shapiro, were "loaders" and that Shapiro had been a "helper", as those respective work categories have been defined heretofore by the Interstate Commerce Commission in the assertion of "power" to prescribe the "qualifications" and maximum service hours of work categories affecting safety of operations as considered to be provided by Section 204(a)(1) of the Interstate Commerce Act (U. S. Code, Title 49, Section 304(a)(1)). (*Re Maximum Hours*, 28 M. C. C. 125.)

The District Court, on the agreed facts, concluded that the overtime pay provisions of the Fair Labor Standards Act did not apply because the suing employees were subject to the Interstate Commerce Commission "power" of control over their qualifications and maximum hours. In its first opinion (54 F. Supp. 565), out of an abundance of liberality, the District Court temporarily withheld judgment of dismissal to afford the complaining employees an opportunity, if they so wished, to approach the Interstate Commerce Commission if they felt that the court had misconceived their status under that Commission's determina-

tions. Upon their later positive refusal of that privilege the District Court entered its final judgment of dismissal against them. (59 F. Supp. 341.)

The Second Circuit Court of Appeals on the same agreed facts held that except as to Shapiro the other suing employees were entitled to recovery under the Fair Labor Standards Act because, although their work was that of "loaders" as defined by the Interstate Commerce Commission, only so much of the variable time of "loaders" as would be spent *inside outgoing* truck vehicles *stacking and piling* the freight packages would concern safety of operation. So much of their time, the court said, as consisted of handtrucking the packages to the vehicles or from them, or between vehicles, and so much of their time as related to "unloading" as distinguished from "loading" would not affect safety. Since (the court further held) the agreed statement of facts did not disclose what was the previous division of time in the performance of those several different portions of the work of "loaders" the motor carrier employer had failed to sustain a required "burden of proof" to show to the satisfaction of the court that the time of the workers inside the outgoing vehicles physically piling and stacking the freight was "substantial". What that court would deem to be "substantial" in that connection was not indicated.

Because the former employee named Shapiro was shown by the agreed statement of facts to have been a "rider" on the vehicles several hours daily the Second Circuit Court of Appeals considered that not only was he a "helper" but that he devoted a "substantial" portion of his daily time in the doing of those things, among all the duties of a "helper", which the court considered affected safety. As to that employee the original judgment of dismissal was sustained.

While their notice of appeal to the Circuit Court of Appeals was given in time the employees did not thereafter docket their appeal or file their record in the appellate court until long after the time prescribed by Rule 73(g) of the

Federal Rules of Civil Procedure. Nor did they, before the expiration of the prescribed time, receive from or apply to the District Court for an extension. The Circuit Court of Appeals, while declaring the excuses given for the delay were "feeble", considered that as the correctness of the judgment of dismissal "presents a substantial question" the Circuit Court of Appeals would not dismiss the appeal under Rule 73(a) as authorized so to do.

Fundamentally, therefore, the appellate court concluded that while some of the work of those motor carrier employees described by the Commission as "loaders" and "helpers" affects safety of operation it is not enough that in those respective capacities, in which they may be "solely" engaged, their several interrelated tasks may account for variable portions of their work time in the doing of those particular things deemed by the court itself to bear the more intimately upon safety.

The power of the Commission to fix the qualifications and maximum service hours of those engaged solely in those employment categories of loaders and helpers was in effect denied by the Second Circuit Court of Appeals except to the extent that it should be shown to the judiciary in a *collateral* proceeding under the Fair Labor Standards Act that the particular suing employees devoted a "substantial" although variable proportion of their time actually stowing and stacking outgoing freight in the vehicles or actually riding the vehicles. Because (that court said) the agreed statement of facts in the precent case did not reveal what were those proportions of variable time so devoted to the several components of the work of "loaders" this petitioner for certiorari had not met a "burden of proof" of factually establishing to the satisfaction of the court that the suing "loaders" were "exempt" from the Fair Labor Standards Act. (The opinion of the Circuit Court of Appeals is attached in the Appendix hereof.)

In that respect the Circuit Court of Appeals for the Second Circuit adhered to what it deemed to be the principle of its own previous decision in *Walling* v. *Comet Carriers,*

151 F. (2d) and its interpretation of the decision of the Supreme Court of Illinois in *Levinson* v. *Spector Motor Service*, 389 Ill. 466. (In both certiorari has been granted by the United States Supreme Court.)

The Circuit Court of Appeals for the Second Circuit, in the present case, further, but very erroneously considered that the Interstate Commerce Commission itself, in its dealing with the several categories of interstate motor truck common carrier employees, had determined that its "power" embraces *only* those particular individuals in each of the respective categories (including "loaders") whose work in the course of a given week may involve "substantiality of time" in the doing of those precise things which the court held concern safety of operation.

In deference to the fact that the Supreme Court of the United States had granted certiorari in the two cases of *Walling* v. *Comet Carriers* and *Levinson* v. *Spector Motor Service*, the court below in the present case later stayed its mandate until February 14th, 1946, in stated appreciation of the "importance" of the question and so as to afford the opportunity of preparing and submitting this petition for certiorari prior to the forthcoming reargument of the case of *Levinson* v. *Spector* and the argument of *Comet Carriers* before a full bench of the Supreme Court.

Jurisdictional Statement

It is respectfully submitted that the United States Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925, (C. 229; 43 Stat. 936) amending the Judicial Code, Section 240(a); Title 28 U. S. C. A., Section 347(a); and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented

The principal issues to be resolved by the Supreme Court are these:

(1) As it is made the statutory duty of the Interstate Commerce Commission, an expert administrative body, to prescribe both the "qualifications" and maximum service hours of employees of motor truck freight common carriers whose work affects safety of operations, does not that power of the Commission necessarily embrace as well the peculiarly administrative authority of first determining *which* categories of motor freight common carrier employees it should deal with in prescribing the qualifications and maximum service hours, and is it not an invasion of administrative authority for any court to deal independently with the same question.

(2) In any event, once having made the determinations as to described truck labor categories whose work the Commission considers affects safety, are those determinations of the expert administrative body capable of *collateral* judicial review, rather than by direct statutory court review, when an action for overtime pay is separately and later brought by particular employees in a single-judge court under the Fair Labor Standards Act.

(3) With respect to "loaders" the Commission, in the exercise of its administrative authority, has determined that they consist of those employees whose sole duties are to "load and unload" motor vehicles "and transfer freight between motor vehicles and between the vehicles and the warehouse". In concluding that its power embraces employees whose sole duties are of that general nature the Commission very evidently recognized that considerable amounts of their time are spent in "unloading" and "handtrucking" the freight "between motor vehicles

and between the vehicles and the warehouses" or other buildings near the parked trucks to and from which freight is delivered and received. Because a variable part of the time of those loaders is also regularly spent inside the vehicles stacking and piling the freight the conclusion of the Commission is that safety of operations is substantially affected by their labor as a whole and that as a consequence it should fix their qualifications and maximum service hours. Is the Second Circuit Court of Appeals correct in deciding, contrary to the Commission, in a collateral damage proceeding under the Fair Labor Standards Act, that only so much of the variable time of persons so employed solely as loaders which they devote to stacking and piling of freight in outgoing vehicles affects safety of operations and that as the petitioner for certiorari did not assume a burden of proving the proportions of time so spent out of their other tasks as "loaders" recovery under the Fair Labor Standards Act may be had?

(4) Was the court below correct in its understanding that the Interstate Commerce Commission itself so intended to assert its administrative power over qualifications and maximum service hours *only* over those individual employees who, although solely "loaders", may spend a "substantial" portion of their time inside the vehicles stowing and stacking the outbound freight to be transported?

(5) When only a "feeble" excuse is given for the failure to docket an appeal and file the record in a circuit court of appeals until long after the time prescribed by Rule 73(g) of the Federal Rules of Civil Procedure is it an abuse of judicial discretion for the Circuit Court of Appeals not to dismiss such an appeal, merely because it should be considered that a "substantial question" as to the correctness of the judgment of the court below exists?

Reasons Relied on for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided important questions of Federal law and practice which have not been and should be settled by the Supreme Court.

Certiorari has already been granted in *Levinson* v. *Spector Motor Service* (No. 139, October Term, 1945) and in *Comet Carriers, Inc.* v. *Walling* (No. 609, October Term, 1945). The present case not only goes to questions which appear to have induced the Supreme Court to grant certiorari in those two cases but those particular questions are even more clearly and sharply drawn in the present case than in those other two. Here the facts were agreed, the employees were "solely" engaged in work as "loaders", and all their work related to interstate commerce.

Interstate motor truck common and contract freight carriers employ many thousands of men who are solely "loaders". They not only perform or assist in performing the physical stacking and piling in the outgoing trucks but they do the unloading as well and the handtrucking between the vehicles and the platforms and warehouses and from one vehicle to another. The International Brotherhood of Teamsters, Chauffeurs, etc. (their Union) joined with the employers long ago in urging upon the Interstate Commerce Commission the conclusion, supported by facts of record at public hearings before that Commission, that "loaders", as a work category, should have their qualifications and maximum service hours prescribed by the Commission. That union has never since receded from its original position in that regard by seeking statutory court judicial review or reconsideration by the Commission. Nor has any motor carrier sought direct judicial review or reconsideration. Consequently interstate motor carrier companies have relied upon the seeming widespread acquiescence in the Commission's view and the assumption that no single-judge court, in a damage action under the Fair Labor Standards Act brought by any individual employees,

would sanction a *collateral* attack upon the Commission's determination either boldly or by an attempt to whittle it down through artificial refinements of a "scholastic" nature.

In principle if not in terms what the Commission itself has said regarding the work category of "helpers" similarly applies. That administrative expert body takes the view that it is "neither necessary nor practicable to draw fine distinctions" with reference to the "degree in which individual employees engage" in activity which the Commission considers has effect upon safety of operations.

2. Essentially the Second Circuit Court of Appeals is here endeavoring to extend the application of its own previous decision in *Walling* v. *Comet Carriers*, 151 Fed. (2d) 107 and in which certiorari was granted a few days after the appeals court decision in the present case.

The opinion of that court in the *Comet Carriers* case reveals a fixed point of view by that court seriously at variance with that of the Interstate Commerce Commission. As an expert administrative tribunal the Commission in the exercise of its own statutory authority has negatived the thought that its powers and duties in respect to qualifications and maximum service hours of "loaders" are confined to those workers a substantial part of whose time is spent inside the outgoing trucks stacking and piling the freight. In the case of *Comet Carriers* the Second Circuit Court of Appeals went along with the Commission (seemingly without independent determination) in the conclusion that the work of "drivers" of motor trucks affects safety of operations. The holding there was that unless the weekly task of so driving trucks should embrace more than one day in transporting goods in interstate commerce then the amount of time so devoted to driving vehicles in interstate commerce would not be deemed "substantial". Here in the present case that court has extended and applied that decision to a situation in which the "sole" duties of the "loaders" working exclusively in interstate commerce consisted of the loading and unloading of freight and the handtrucking of it from one vehicle to another and between the vehicles and the

building structures into and out of which the freight to be loaded and unloaded from the trucks must be received and delivered. But here the Court of Appeals would apply the test of "substantiality" to only one of the component and variable parts of the time devoted to a particular part of their task by persons who are "solely" employed as loaders.

This is an unwarranted attempt judicially to invade the administrative province of the Commission and to do so in a collateral proceeding. Unless and until a statutory three judge court shall have reviewed, by direct action, the Commission's determination in this field it is not component so to bring those Commission determinations into judicial question in a damage action under the Fair Labor Standards Act.

3. The Court of Appeals plainly erred in assuming that it is not necessary, in the interest of safety, to prescribe qualifications and maximum service hours for employees who actually and regularly pile and stack freight in the vehicles unless the time they spend in that way, out of their related tasks as loaders, is "substantial".

4. The court below erred in its assumption that the Commission's determination that the work of loaders affects safety was meant by the Commission itself to involve the need of inquiring in each instance how much of the variable daily time of "loaders" in the past or in the future was or would be spent in "unloading" and transferring freight between motor vehicles and between the vehicles and the warehouse as compared with the time spent inside the outgoing vehicles piling and stacking the freight.

The Commission itself in its own opinion in 28 M. C. C. 125 did not say that such time division is material in respect to those employees whose "sole" duties are those of "loaders" as defined by the Commission. It asserted power to the contrary.

5. The Second Circuit Court of Appeals abused any judicial discretion possessed by it under Rule 73(a) of the

Federal Rules of Civil Procedure in declining to dismiss the appeal since even that court stated in its opinion that only "feeble" excuses were given to it for not docketing the appeal and filing the record in that court until long after the time prescribed by Rule 73(g).

In this and other cases the Second Circuit Court of Appeals and several others are practically making a dead letter out of Rule 73(g). The Circuit Court of Appeals for the District of Columbia, back in 1940 (*Burke* v. *Canfield, et al.*, 111 Fed. (2d) 526) declared that while, under some circumstances, Rule 73(a) permits the appellate court to withhold dismissal for an "excusable" delay in docketing and filing of record, it further said:

> "We think it timely to advise the bar that we intend to exercise sparingly our discretion to save an appeal prosecuted in disregard of the rules. For notwithstanding the modern trend which we fully approve, it is desirable that courts and counsel bear in mind Justice Storey's admonition that 'infinite mischief has been produced by the facility of courts of justice in overlooking errors of form'."

Mr. Justice Rutledge, then a Circuit Judge, concurred.

Here in the present case, as in others coming before it from time to time, the Second Circuit Court of Appeals appears to consider that if an unperfected appeal appears to present "a substantial question" then the time limits of Rule 73(g) may be disregarded with impunity. In growing measure substantially the same point of view, as a mere matter of local practice, is developing elsewhere with some of the other circuit courts of appeal.

Clearly there would be no point in the Congressional enactment of Rule 73(g), intended to give successful litigants repose, if flagrant disregard of the prescribed limits of time for perfecting appeals depended on nothing more than the presence of "substantial questions" going to the merits of the cases. If it be granted that the Circuit Court of Appeals under Rule 73(a) possesses a reserve power to alleviate the consequences of "excusable" delay it should

not be the supposed possible or even probable merit of the case but whether the excuse for delay is "feeble" or "strong" that should govern the exercise of sound judicial discretion in regard to dismissal. Otherwise the prescription of time limits in Rule 73(g) would be meaningless.

ARGUMENT

Summary of Argument

Compressing somewhat for the purpose of argument the above statement of five questions presented certiorari should be granted for the reason that:

Point I

Important questions of Federal law are here more squarely presented than in the two other cases pending in the Supreme Court in which certiorari has been granted.

Point II

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is an invasion of the administrative authority of the Commission, it is contrary to the decision of the Interstate Commerce Commission reached in the exercise of its administrative authority, and it involves a collateral attack upon that decision.

Point III

The Second Circuit Court of Appeals erred in concluding that safety of motor carrier operations is not affected unless the amount of time devoted by workers engaged solely as "loaders" is substantial as to those variable portions of it which consist of piling and stacking freight in outgoing vehicles in connection with their other daily tasks as loaders. The Commission decided to the contrary.

Point IV

The refusal of the Second Circuit Court of Appeals to dismiss the appeal before it in the present case, notwithstanding the docketing and filing of the record with it were not timely, presents an important question of federal practice not heretofore decided by the Supreme Court and it is in direct conflict with decisions of the Court of Appeals for the District of Columbia and two other Circuit Courts of Appeal, it having here been concluded by the Second Circuit Court of Appeals that the excuses given for the delay in this present case were "feeble".

DISCUSSION

I

Important questions of Federal law are here more squarely presented than in the two other cases pending in the Supreme Court in which certiorari has been granted.

The provisions of Section 7 of the Fair Labor Standards Act do not apply to any employee of an interstate railroad, express company, pipe-line company, sleeping car company, or other common carrier subject to the provisions of Part I of the Interstate Commerce Act, including water carriers operating under common control, management, or arrangements for continuous carriage or shipment of freight between them and railroads. In terms Congress made the Fair Labor Standards Act in applicable to them *even though its separate legislation dealing with the prescription of maximum service hours of railroad employees was confined to those whose work affects safety and the Hours of Service Act does not apply at all to some of those other common carriers.* Employees of common carrier street and interurban electric railways are not covered by the Fair Labor Standards Act, nor are employees of airway carriers.

With respect to motor common and contract carriers the Interstate Commerce Act makes it the duty of the Com-

mission to prescribe the "qualifications" and maximum service hours of "employees". As to private motor carriers (defined in substance as manufacturers and distributors hauling their own goods by truck) the power of the Commission to fix the qualifications and maximum service hours of the employees of such industries was, properly, confined to those of their employees whose work affects safety of their motor truck operations. An appealing reason for the distinction arises from the fact that Congress did not wish to render the Fair Labor Standards Act inapplicable to *all* employees of industry who happen as private motor carriers to be hauling their own goods.

In the light of those respective and differing provisions fixing the Commission's power over the qualifications and service hours of employees of the several types of motor carriers along with employees of all other types of carriers, Congress, in the later Fair Labor Standards Act, made the provisions of Section 7 of that Act inapplicable to *such* of the employees of the three separate and different types of motor carriers whose qualifications and maximum hours of service the Commission is empowered to prescribe. At first reading that would, in analogy to common carriers subject to Part I of the Act, make Section 7 of the Fair Labor Standards Act inapplicable to *any* employees of motor common or contract carriers.

This court however in *U. S.* v. *American Trucking Associations, Inc.*, 310 U. S. 534, by bare majority vote, held that while the language used by Congress in the Interstate Commerce Act was not ambiguous nevertheless the Congressional intent, with respect to employees of common and contract motor carriers, like its intent with respect to private industries operating their own trucks, was to confine the Commission's power over their qualifications and hours of service to those whose work "affects" safety of operations.

Had a majority of the Supreme Court voted the other way in the case of *American Trucking Associations* and held that all employees of motor common and contract carriers for hire are within the control of the Commission and

hence exempt from the Fair Labor Standards Act, such a decision would have made the Congressional intent with respect to common and contract motor carrier employees at least consistent with its intent regarding the employees of all other forms of competing carriers such as air lines, railroads, water carriers, pipe lines, express companies, sleeping car companies, etc. In that event neither this nor the litigation in the *Comet Carriers* and *Spector Motor Service* cases would have arisen as to motor common and contract carriers.

But, since a majority of the Supreme Court, for reasons which were deemed sufficient, attributed to Congress the intent (not revealed by the words used in the statute) to put motor common and contract carriers into a different position than all their competitors that majority decision, unless reversed, now or later, is required to be taken as the starting point.

That majority decision brought within the purview of Section 7 of the Fair Labor Standards Act a substantial number of the employees of motor common and contract carriers (such as clerks, solicitors, watchmen, etc.), while their competitors remain outside. The Administrator of the Wage and Hour Division of the U. S. Department of Labor is now persisting, through his own "Bulletins", in agitating for further inroads into the Congressional exemption of motor common and contract carrier employees by introducing the wholly impracticable idea that of the remaining much greater number of employees, such as loaders, helpers, drivers, mechanics, etc., only those are to be exempt who devoted, out of their whole time, a "substantial" part of it, to those precise tasks which the judiciary (not the expert Interstate Commerce Commission) may think affects safety of operations. Those time percentages evolved by the Administrator have vacillated between 20 and 50 per cent of the worktime of the employees!

All of that newly attempted cutting down of the Congressional exemption springs from Administrator's wrongful assumption of the intent or effect of the majority decision in the *American Trucking Associations* case making the effect upon safety of operations the basis of ap-

plicability of the Fair Labor Standards Act to the regulated motor common carriers.

For the Supreme Court to uphold this present endeavor of the Administrator would be almost destructive of the motor carriers for hire industry. Many thousands of people are employed by the industry in labor categories the work of whom the Interstate Commerce Commission has determined affects safety of operations within its control such as loaders, helpers, drivers, mechanics, etc. The labor unions, the carriers, and all but a few of their employees have long acquiesced. It would be ruinous to that industry, already in a precarious financial position, now to hold it subject to a multitude of court judgments which in the aggregate would involve vast sums (running into millions) including the penalties and of course the hoped for attorneys' fees.

The Administrator is not, as to motor carrier employees, endowed with any administrative authority. The Interstate Commerce Commission is. It possesses definite administrative powers and duties in this particular field. The Administrator would no doubt have a standing to appear before the Commission; and he can agitate in other ways extremist points of view because of his peculiar concern to have the Fair Labor Act pushed to the limit of its possible application. The Interstate Commerce Commission is concerned with prescribing the qualifications and *limiting* the maximum service hours of motor carrier employees. The Administrator is concerned only that there be a deterrent against excessive hours of employees and a financial reward for them through collection of overtime rates of pay by those carrier employees not subject to the Commission's control. It is not his function, however, to determine who those non-exempt employees are.

The Second Circuit Court of Appeals has adopted extremist views regarding the coverage of the Fair Labor Standards Act not only in this but in other recent cases before it. In one the Supreme Court lately spoke of these problems as "not an exercise in scholastic logic" wherein the Second Circuit Court of Appeals had undertaken to work out and apply its "percentage" theory of statutory application (*10 East 40th Street Building, Inc.* v. *Callus*, decided June 11, 1945).

To the extent of what the majority of the Supreme Court actually decided the *American Trucking Association's* case the Administrator of the Wage and Hour Division is at least warranted in pointing to the fact that not all motor carrier employees but only those whose work affects safety of operations are outside the reach of the statute with which alone he is concerned. But a number of consequences and questions have flowed from that majority decision of the Supreme Court. They are presented by the situation involved in the present case and in those of *Comet Carriers* and *Spector Motor Service*.

Indubitably as the first consequence there became invested in the Commission the distinctive administrative function of initially and primarily utilizing, on the basis of public hearings, its expert judgment and thereupon concluding *which* categories of common and contract motor carrier employees perform tasks which in that judgment of the Commission *would* affect safety of operations. The later decision of this Court in *Missel* v. *Overnight Transportation Co.*, 316 U. S. 572, did not qualify that broad consequence and meaning of the decision in the *American Trucking Associations* case. The holding in the case of *Missel* v. *Overnight Transportation Co.* simply was that since, by the time that case had reached the Supreme Court, the Commission *itself* had already determined the work of "clerks" employed by motor common carriers did *not* substantially affect safety of operations, Missel was entitled to maintan a damage action under the Fair Labor Standards Act for unpaid overtime compensation. The Supreme Court there indicated its own view that manifestly the decision of the Commission as to clerks was correct.

But another important consequence followed the underlying concept of the majority decision in the *American Trucking Associatin's* case. Nothing in the legislation of Congress plainly adjusted or accommodated the exercise of primary administrative authority by the Commission under the statute which it administers and the judicial authority under Sections 7 and 16 of the Fair Labor Standards Act as applied to motor carrier employees. If the

majority decision in the *American Trucking Association's* case is to be adhered to there now exists need further to fashion, presently by judicial determination, the practical means of reconcilation between the two statutes.

Essentially, it would appear, the object of this court has been to bring up and resolve this important matter when it issued certiorari in *Levinson* v. *Spector Motor Service* and later in *Comet Carriers* v. *Walling*. The present case, however, more directly involves and invites solution of the problem than does either of those other two. Here, unlike the case of *Comet Carriers*, the suing employees are agreed to have worked exclusively in interstate commerce. Here, unlike *Levinson* v. *Spector Motor Service*, the work of the suing employees consisted "solely" of that of loaders and a helper within the very context and definitions of the Interstate Commerce Commission's own assertion of power over those categories. (28 M. C. C. 125). Here, unlike either of those other two cases, the Circuit Court of Appeals has first arrived at its own independent conclusion that only when, of all the time spent by persons employed solely as loaders, that which may be spent by them in piling and stacking freight in outgoing vehicles is shown to be "substantial", should recovery under the Fair Labor Standards Act be denied. Then, as if to support its own conclusion in that regard, the Second Circuit Court of Appeals has erroneously culled from its context certain language used by the Commission itself in 28 M. C. C. 125, and attributed to it concurrence by the Commission in the court's erroneous point of view.

This, then, is the best of the three cases in which the Supreme Court may reach the core of the whole problem, both procedurally and on the merits. Here, free of any complications, there is presented the most sharply the important nation-wide questions and their dependent consequences which seemingly induced the Supreme Court to issue certiorari in the *Spector* and *Comet Carriers* cases.

II

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is an invasion of the administrative function of the Commission, it is contrary to the decision of the Interstate Commerce Commission reached in the exercise of its administrative authority, and it therefore involves a collateral attack upon that decision.

These three propositions are now elementary: (1) the field of administrative responsibility which is vested in the Interstate Commerce Commission may not be invaded by the judiciary; (2) the validity of what the Commission does may be inquired into by the judiciary only when a direct review action is brought against the United States before a statutory three-judge court; and (3) in no form of judicial proceeding, to which the United States is not a party, may there be collaterally drawn into question the rightness of the Commission's determinations.

When purporting to exercise or not to exercise its administrative authority over the qualifications and maximum service hours of motor carrier employees the established system of three-judge statutory court review of the Commission's determinations applies. (*U. S.* v. *American Trucking Associations, supra*). Congress has not consented to a suit involving the validity of the Commission's determinations except in that form of direct proceeding and to which the United States must be a party. (*Venner* v. *Michigan Cent. R. Co.*, 271 U. S. 127; *State of Texas* v. *I. C. C.*, 258 U. S. 158; *North Dakota ex rel. Lemke* v. *C. & N. W. R. Co.*, 257 U. S. 485; *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377).

From that premise the Supreme Court has further reasoned and declared with emphasis that the validity of the Commission's administrative determinations may not be tested in a collateral proceeding to which the United States is not a party:

> "As before indicated, the United States is made by statute a necessary party to a suit to set aside an

> order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature" (*Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493).

In the later case of *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377, the rule was again stated and applied. In that litigation a coal company had brought suit in a State court to enforce the railroad tariff rules governing the distribution of coal cars in times of car shortage. Upon removal to the United States District Court and the filing of railroad answer and motion it became evident that the railroad tariff rule was itself only a reflection of what the Interstate Commerce Commission had previously determined in a general service order what should be the rule for railroad coal car distribution. Nevertheless the Circuit Court of Appeals undertook, in that action only between the shipper and carrier, to pass upon the enforceable character of the Commission's prescription. The Supreme Court of the United States reversed with direction that the action should be dismissed for want of jurisdiction. In the course of its opinion the Supreme Court there said:

> "The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was *in effect* sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three Judges. * * * The fact that this was a suit to set aside an order of the Commission *did not appear on the face of the bill;* but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (Italics supplied.)

Here, in a judicial proceeding having on its face only the form of a suit for damages under the Fair Labor Stand-

ards Act, the Second Circuit Court of Appeals, as if separately so authorized so to do, has undertaken either to invade the administrative field occupied by the Commission or in any event to collaterally review the rightness of what the Commission has done. That court, first without any reference to what the Commission may have decided, approached the case as if there were presented to it a judicial question (rather than administrative) as to whether or not it was shown of record that the work of the suing employees affected safety of motor carrier operations. That court, of its own volition, and not on any sort of record fully developing facts that would be pertinent in an administrative proceeding, resolved that safety of operations is affected only by so much of the work of those engaged solely as loaders or helpers as may involve respectively their riding the trucks or their standing inside outgoing truck vehicles piling and stowing the freight.

But that was the very task imposed upon the administrative authority—the Interstate Commerce Commission, according to the decision of the Supreme Court in *U. S. v. American Trucking Associations, Inc.*, supra. There may be, of course, extreme cases in which so very obviously no part of the work of a motor carrier employee could possibly affect safety of operations (such for instance as that of a freight solicitor) that no administrative problem would be involved. In that respect the situation would be analogous to the dealing with railroad freight tariffs in suits for overcharges. The Supreme Court in *Great Northern Ry. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285, drew such a distinction. It there was held that while the meaning of railroad freight tariffs, like other written instruments, might in some instances present only a judicial question yet when the subject of controversy is one involving the meaning of technical terms in the complex field of tariffs for transportation, an administrative problem is presented and an original judicial action for overcharges will not lie. That decision was elaborated in *Standard Oil Co.* v. *U. S.*, 283 U. S. 235 and *W. P. Brown & Sons Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393.

The Supreme Court has been moving with certainty toward the objective of assuring that at all times it be the administrative agencies and not the judiciary which shall primarily (under suitable methods of judicial review) occupy the field when there are presented complex matters calling for expert determinations on ample records and within the competency of those bodies to decide. As late as January 14, 1946, in *Order of Railway Conductors* v. *Pitney, et al., Trustees,* the Supreme Court restated and applied this broad philosophy of Government to a controversy arising under Section 6 of the Railway Labor Act where the Adjustment Board provided for in that Act had not yet functioned in the matter. In disallowing to the United States District Court who had appointed the railway trustees the right to decide the controversy the Supreme Court said:

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. * * * Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to assure compliance with the statute."

The need for national unification of tariff interpretations is no greater than the need for unification in the administration of the Commission's authority over the qualifications and maximum service hours of motor carrier employees. There is intensity of competition between motor carriers and between them and railroads and motor carriers which caused enactment of the National Transportation Policy to compose the struggle in the public interest to the end of preventing destructive competition. (*Eastern Central Motor Carriers Asso.* v. *U. S.*, 321 U. S. 194). It would therefore not do to leave each of the state or United States District Courts free to do so, nor to impose upon them the intricate and involved duty of measuring, in each particular case of a suing employee, the *degree* to which the several

component parts of his work may have affected in the past, or would in the future affect, safety of operations. The statute itself says nothing about "substantial". No legislative yardstick of the sort has been prescribed. Nor is the situation here like that of need to accommodate, under sound constitutional principles of comity, conflicts between State and Federal authority arising when it is claimed that State action has imposed upon interstate commerce a "substantial burden". (*State of Florida* v. *U. S.*, 282 U. S. 194).

There cannot be attributed to Congress, as a consequence of the majority decision in *United States* v. *American Trucking Associations, supra,* the intent that all the various State courts and United States District Courts as well as the Interstate Commerce Commission should be free individually to find out what kinds of work and how much of it affect safety of operations when performed by employees of motor carriers. Either the Commission or the courts must occupy the field. There is no precedent for concurrent authority in any other statute. That it should be the Commission which has the authority follows from the very intricate administrative nature of the inquiry and the need for national uniformity of determination. There is no room for compromise by judicially evolving and seeking to apply either a nebulous or arbitrary test of "substantiality of time" devoted by the employees having varied but related duties. That would only make bad matters worse and lead to hopeless confusion, uncertainty and variability of results as between the different types of employees and as between the competing motor carriers themselves. The National Transportation Policy could never be achieved under circumstances of that kind.

Nor could it have been the scheme of Congress to throw upon the overworked Supreme Court of the United States the added burden of bringing about the required competitive "national uniformity" which the practical necessity of the motor carrier industries would require in respect to qualifications and service hours of their employees whose work, other than that of some clerks and a small minority

of others, essentially involves tasks that affect safety of operations.

Judge Fee, the United States District Judge who presided at the trial of this present litigation, saturated his two opinions with full and carefully reasoned analysis of the essentially administrative character of the matters here being discussed. He emphasized the utter impracticability of throwing upon the judiciary a task of the nature proposed to this court.

But the Second Circuit Court of Appeals, even in its very approach to the case, has first essayed invasion of the Commission's own administrative function. There was no record before that court putting it in position to weigh with care all the facts pertinent to the question of what *parts* of their work and *how much* of the time of loaders and helpers affects safety of operations and what or how much does not. Indeed that court, in its reversal of the court below, held the Fair Labor Standards Act to be applicable here not because, as to these loaders, the court concluded the time devoted by them to stacking and stowing in outgoing vehicles was "insubstantial" *but because it had not been shown* in the agreed statement of facts to have been "substantial". One may well wonder, had the record shown (contrary to practical possibilities) the facts as to the variable portions of the times of the individual loaders years ago actually spent by each inside the outgoing vehicles each week by what authority would the Second Circuit Court of Appeals have arrived at its ultimate conclusion of the degree of "substantiality" or the lack of it deemed by it essential.

It is here necessary again to emphasize that the Second Circuit Court of Appeals first arrived at its result in the case without reference to anything which the Commission itself had already determined in the exercise of the administrative authority. It stated and applied its own test of substantiality without references to the views of the Commission. It did not, as even the District Court had done, say in effect that while the Commission's own decision seemed to have embraced these suing employees judg-

ment against them would be temporarily withheld to afford them the opportunity to go to the Commission for an informative explication. They could have done so had they so wished (*Schenley Distilleries Motor Division, Inc.* v. *U. S.*, Sup. Ct. of U. S., decided January 2, 1946). They refused and deliberately took the risk of judgment.

But in any event rightly read the Commission's determination in 28 M. C. C. 125 does not admit of the qualification which the Second Circuit Court of Appeals has undertaken to impose upon the Commission's authority. When this court, in the pending case of *Levinson* v. *Spector Motor Service*, invited the Interstate Commerce Commission to file with it a brief as amicus curiae, the Commission's counsel, in his brief, declared that "the views of the Commission", as shown in its report, are that the work of that class of motor carrier employees designated as "loaders" directly affects the safety of operations of the carriers' vehicles on on the highways. It is then said in that brief that the "rightness" of those "views of the Commission" would appear "hardly open to question". From that premise it is said to be "clear" that—

> "regardless of the amount of time devoted to the work of an individual loader he is expected to be fitted, and in fit condition, to perform it when the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service" (p. 27 of the I. C. C. brief).

As its controlling conclusion the Commission, in that brief of its counsel, urges—"It seems clear that, regardless of the amount of time devoted to the work by an individual loader" safety of operation requires that his qualifications and service hours be fixed by the Commission in accordance with the Commission's own determination of its authority.

From the standpoint of the Interstate Commerce Act itself the Solicitor General of the United States, in that same case of *Levinson* v. *Spector Motor Service*, also sup-

ports the views of the Commission. In his brief before the Supreme Court, also filed as *amicus curiae*, he says—

> "We agree with the construction of the Motor Carrier Act set forth in the brief amicus curiae being filed on behalf of the Interstate Commerce Commission. The Commission argues that if a person is engaged in operations relating to safety for any time at all it has some power over him and that this result is necessary if dangerous driving by tired drivers who work long hours and spend only a short time driving is to be avoided".

It is true that the Solicitor General goes on to say, however, that the rightness of that construction of the Interstate Commerce Act would create "consequences" under the Fair Labor Standards Act which the Solicitor General is "reluctant" to ignore. By that, seemingly, he means that the correct construction of the Interstate Commerce Act *ought* to yield to the desirability of allowing unqualified motor carrier employees to work excessive lengths of time in order that they might earn overtime pay and recover it, with damages, in court under the Fair Labor Act. The Solicitor General is "reluctant" to contemplate that the Commission's construction of the Interstate Commerce Act, which he concedes to be *correct*, would interfere with those recoveries.

It results, therefore, that the Second Circuit Court of Appeals in the present case has plainly engaged in a "collateral" attack upon the Commission's own determinations as to the scope of its power in relation to loaders and in which Commission determination seemingly the Solicitor General reluctantly acquiesces. But this sort of collateral attack is not something which the Second Circuit Court of Appeals or any of the United States District Courts or the state courts are permitted to make. If it be considered that there is fault in the Commission's views the proper direct action before a statutory reviewing court, on the record made before the Commission, would have to be instituted by any proper party in interest naming the United States as the defendant. And if, in such a direct

action, it were to be considered by the Supreme Court that the Commission's determination is either erroneous in law or indefinite and ambiguous or not supported by the record before the Commission or that the ultimate conclusions of the Commission lack sufficient explication the proper form of judicial decree is clearly indicated. (*Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493; *Eastern Central Motor Carriers Asso.* v. *U. S.*, 321 U. S. 194.)

The Second Circuit Court of Appeals should have upheld the dismissal of this action as had been adjudged by the United States District Court.

III

The Second Circuit Court of Appeals erred in concluding that safety of motor carrier operations is not affected unless the amount of time devoted by workers engaged solely as "loaders" is substantial as to those variable portions of it which consist of piling and stacking freight in outgoing vehicles in connection with their other daily tasks as loaders. The Commission decided to the contrary.

Both the trial court and the Court of Appeals in the present litigation, as well as the Commission, have all agreed that persons employed by motor common carriers as loaders perform work which affects safety of operations. On the full record before it in 28 M. C. C. 125 the Commission concluded that the proper stowing and stacking of freight in outgoing vehicles bears intimately upon safety of operations. It was further concluded by the Commission, on the record before it, that most of the larger motor common carriers employ separate crews or gangs of men whose "sole" duties are those of "loaders". In its description of their duties the Commission found as a fact that their work generally includes "unloading" in the mornings as well as "loading" in the afternoons. It further found as a fact that included within their duties as loaders is the handtrucking of freight from one of the truck vehicles to

another in the course of loading and unloading and that it also includes carrying by hand or handtrucks between the vehicles and the places to and from which the freight is picked up or laid down inside the buildings. In variable proportions of their time those same loaders, as to outgoing freight, stand inside the vehicles and do the stowing of the freight packages.

Not all members of a given gang would be inside the vehicles at a given time, especially when, as in the present case, there may also be inside the vehicles for the same purpose a "helper". Then, too, varying with the quantity and types of the freight, weather conditions and the times of day, first one of the gang and then another would be doing the work inside the vehicles while the others are carrying the packages by some means into or out of the truck terminals or into or out of the buildings in front or near which the trucks are standing such as in the congested Garment Center of New York City.

If, then, proper stowing and stacking of outgoing freight has an important bearing upon safety of operations, it is very evident that the Commission is right in its conclusion that those who perform such tasks should be physically and mentally qualified and they should not be left in position to work undue long hours merely for the sake of earning overtime pay or because they would otherwise be required to. The handtrucking of freight between the tailboards of trucks in either direction from or to the terminal platforms or inside the terminal buildings or between the trucks and the industrial buildings near which they are parked for loading and unloading, or from one building to another, is manual labor—often arduous. It is fatiguing. Rightly the Commission's view is that since it is a regular part of the duty of those engaged solely as loaders to do all or a part of the work of stacking and stowing in the vehicles a division of their variable time as between that task and the others which characteristically belong to loaders is not material nor practicable.

A man might spend fifteen hours handtrucking heavy packages of freight to and from the truck tailboards and then spend only thirty minutes inside the truck. But at that point of fatigue and mental letdown the hazard of allowing to him the function of properly stowing and stacking freight is the greatest.

Nor as a practical matter as the motor carrier industry is conducted could the Commission confine its prescription of qualifications and maximum service hours not to loaders, as such, but only in accordance with some stopwatch type of formula of apportionment of their time during any given week.

Beneath all that would still remain the question of how much time in proportion to the total work time of the employees should be deemed pertinent to be taken into account by any scholastic test of "substantiality" in each individual instance before it could be concluded whether the Fair Labor Standards Act or the Interstate Commerce Act would apply.

Nothing in the reported decision of the Commission negatives those considerations. When the Second Circuit Court of Appeals culled out of its context some of the Commission's language as if to the contrary it simply misconstrued the Commission's own decision. When in that decision reference was made to "substantial" time the context clearly shows that the Commission used the phrase in connection with categories of labor and not the experience of *individual* employees within the respective categories. That, at least as a matter of "power", the Commission was entitled to do.

Certiorari should be granted because of these important questions hereinbefore briefly discussed.

IV

The refusal of the Second Circuit Court of Appeals to dismiss the appeal before it in the present case, notwithstanding the docketing and filing of the record with it were not timely, presents an important question of Federal practice not heretofore decided by the Supreme Court and it is in direct conflict with decisions of the Court of Appeals for the District of Columbia and two other Circuit Courts of Appeal, it having here been concluded by the Second Circuit Court of Appeals that the excuses given for the delay in this present case were "feeble".

Perhaps ordinarily the Supreme Court would not grant certiorari when only a point of Federal practice may be involved. Here, however, is an important matter of Federal practice which seemingly calls for finality of determination by the Supreme Court to resolve a conflict of views between the different Circuit Courts of Appeal and to terminate a developing laxity of Rule enforcement.

The judgment of the U. S. District Court in the present case was entered February 19, 1945. Notice of appeal was then filed March 29 of that year.

Pursuant to Act of Congress of June 19, 1934; Chapter 651 (48 Stat. 1064) the Supreme Court of the United States adopted the "Rules of Civil Procedure for the District Courts of the United States". Rule 73(g) thereof provided that within 40 days after a notice of appeal from the District Court to the Circuit Court of Appeals the appeal shall be docketed and the record on appeal filed in the appellate court. If, *prior* to the expiration of that period of 40 days, the District Court, in its discretion may so determine, the time for docketing the appeal and filing the record on appeal may be extended by it but not to a day later than 90 days from the first notice of appeal.

After the expiration of that period of 40 days it is not within the authority of the District Court, either on motion

or otherwise, so to extend the time for completing the appeal, notwithstanding the provisions of Rule 6(b) which has to do with "enlargement" of times fixed for the doing of various things provided in the various Rules. (*Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. S.).)

But Rule 73(a) has been construed in those same cases to mean that nevertheless, in the exercise of a sound judicial discretion, the Circuit Courts of Appeal may or may not dismiss appeals to them when the docketing and filing of records with them shall not have occurred within the 40 day period after notices of appeal and no authorized extension of time had been granted by the District Courts.

The Second Circuit Court of Appeals, however, and several others of the appellate Federal courts, now seemingly regard the time limits fixed by Rule 73(g) as virtually meaningless. There is developing under their unduly liberal tolerance the practice of treating the 40-day limit with virtual unconcern merely because it may seem that, notwithstanding the lack of any proper excuse for the delays, the appeal may present what appears to be "substantial" questions.

Thus, as typical, in the present case the prescribed period of 40 days expired early in May, 1945. As said by the Second Circuit Court of Appeals in its opinion in this case thereafter—"Nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the District Court or this court until July 20."

On July 19, a Mr. Ramey (not attorney of record in the litigation) notified counsel for this Petitioner for Certiorari that the following afternoon he would present to a single Judge of the United States Circuit Court of Appeals for the Second Circuit "a motion for an order extending the time within which the plaintiff shall have to file in the office of the Clerk of the said Court the record on appeal herein".

Accompanying the notice was a copy of an affidavit of that Mr. Ramey, which he stated would be submtited to that individual Circuit Judge.(*)

On the afternoon of July 20, 1945, Hon. Augustus N. Hand, an individual member of the Second Circuit Court of Appeals, signed a purported order endeavoring to extend to the 1st day of September, 1945, the time for serving and filing the record on appeal. That purported order of Judge Hand was later filed in the District Court and a copy of it, certified by the Clerk of that Court, has been filed with the Clerk of the Supreme Court as a part of the record in these certiorari proceedings.

That purported order of Judge Hand declared that the motion was made before him and that his purported order was made "on reading the affidavit of Deane Ramey, sworn to the 19th day of July, 1945."

Therefore, from the date of the notice of appeal there elapsed nearly *4 months* before anything was done toward completing the appeal and at that time nothing more was done than to obtain a purported order of a single Judge of the Circuit Court of Appeals setting back an additional 40 days to as late as September 1, 1945, the filing date.

Upon the convening of the Circuit Court of Appeals for its fall term early in October counsel for the then appellee filed and argued before the membership of that court (three judges sitting) a motion to dismiss the appeal because of inexcusable dilatoriness. It was denied from the Bench with the mere observation of Hon. Learned Hand that the delay in docketing and filing of the record had no effect because, by then, they had in FACT occurred! Later, in connection with final submission of the cause, the dismissal motion was renewed.

(*) While recorded by the Clerk of the Circuit Court of Appeals for the Second Circuit neither the notice of motion nor its accompanying affidavit were taken into the files of either the appellate court or the District Court. Uncertified copies thereof are therefore attached hereto in the Appendix to this Petition for Certiorari.

In its eventual opinion in the case the appellate court, on this point of practice, first merely stated that there had been obtained from a single Judge of its court an extension order on July 20, 1945, giving until September 1. Then the Second Circuit Court of Appeals declared that the appellate court possesses discretion under Rule 73(a) to dismiss or allow a dilatory appellant to proceed.

The court in that opinion denied the renewed motion to dismiss, declaring that while the excuses given for the delay by an attorney not even an attorney of record were "feeble" dismissal would be refused only upon the stated ground that the appeal "presents a substantial question as to the correctness of the judgment".

That the excuses given for the delay in the affidavit of Mr. Ramey were "feeble" is self-apparent. His affidavit before Judge Hand claimed nothing more than that he (not the attorney of record) had experienced delay in getting the papers from Mr. Spielvogel, who was the attorney of record, that thereafter Mr. Ramey had experienced "stenographer troubles", and that whereas his partner, Mr. McKelvey, had supposed that Mr. Ramey was attending to the matter he, Mr. Ramey, had supposed that his partner was!

Not to dismiss the appeal under the circumstances was plainly contrary to the purposes of the Rules of Civil Procedure. Not only in this but in other cases the Second Circuit Court of Appeals, along with several others, seemingly attributes so little force to the time limits imposed by Rule 73(g) as to make a virtual dead-letter of those parts of that Rule and to make the matter of dismissal or non-dismissal dependent only upon whether the dilatory appeal proceedings seem to that court to "present a substantial question".

Even if it be true that some measure of judicial discretion is possessed under Rule 73(a) by the appellate court it is plain that a single Judge of that court, long after the expiration of the 40 day period has no function to perform in regard to extensions. The full court memberships, and not single Judges, declined dismissals in the cases herein-

above cited in this form of practice. Moreover even the terms of Rule 73(a) speak of "such action as the appellate *court* deems appropriate". That does not mean a single Judge of the appellate court.

So here, after the 40 day limit expired early in May, 1945, the case was docketed and the record filed in the appellate court not until September 1, or *nearly five months* after the notice of appeal. Here even that court, in its opinion, notes that the excuses given for the delay were not supplied by the attorney of record but by another lawyer whom the court itself described only as "of counsel". Those excuses the court properly said were "feeble". But because a "substantial question" as to the rightness of the judgment appeared to exist the Circuit Court of Appeals allowed the case to proceed without dismissal.

That view of its authority and duty puts the Second Circuit Court of Appeals in the position of saying (and such is its actual practice) that if it thinks a substantial question of the rightness of judgment may be presented then even "feeble" excuses for serious dilatoriness may and will be disregarded.

But successful litigants in the trial court are entitled to a reasonable measure of repose after a long lapse of time and seeming intention of the losers to default even after a notice of appeal. The proper test of the exercise of sound judicial discretion is the "excusability" of the delay even in the presence of a substantial question in the case. What would be deemed a type of good "excuse" is indicated in the three decisions hereinabove cited.

But as long ago as 1940 the Circuit Court of Appeals for the District of Columbia, when Mr. Justice Rutledge was a member, sounded a sharp note of warning to the bar that the reserved authority of the Federal Courts of Appeal to disregard dilatoriness should be "sparingly exercised" and only when sound judicial considerations would make it appear that the delays are "excusable". (*Burke* v. *Canfield, supra.*) Rule 73(g) (a rule of intended repose should not be made into a dead letter. When an action is

dismissed by the United States District Court and a perfunctory notice of appeal given the failure thereafter for a long period of time to follow up must be penalized regardless of the presence of a "substantial question" which was decided. When, as here, the attorney of record in such an action seemingly drops a case, and then later a stranger to the record bobs up nearly five months after the notice of appeal with his appeal papers and resists dismissal in the appellate court only upon the "feeble" excuses given by Mr. Ramey in this instance, a grave injustice will have been done this petitioner for certiorari by the action of the Second Circuit Court of Appeals in not dismissing.

It is believed that the time has come for the Supreme Court of the United States to reinstate the intended vitality of Rule 73(g) and to admonish the Second and any other Circuit Court of Appeals that feeble excuses will not suffice to prevent dismissals of appeals in which flagrant dilatoriness in docketing appeals and filing the appeal records has occurred. If the Supreme Court grants certiorari in this particular case on the first three grounds embodied in this petition it is respectfully urged that this particular ground be included as well because the time and occasion are at hand for the Supreme Court to speak on this subject of general importance to the courts, the bar and the public.

Respectfully,

CHARLES E. COTTERILL,
Counsel for Petitioner.

Appendix "A"

(Opinion of the Court below)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—October Term, 1945.

(Argued November 13, 1945 Decided December 28, 1945.)
Docket No. 19908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP.,

Defendant-Appellee.

Before:

L. HAND, SWAN and FRANK,

Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act of 1938, 29 USCA §201 *et seq.* From a judgment dismissing their complaint, 59 F. Supp. 341, the plaintiffs appeal. Reversed in part; affirmed in part.

LEON E. SPIELVOGEL, *Attorney for appellants;*
Ramey & McKelvey, of counsel.
CHARLES E. COTTERILL, *Attorney for appellees.*

SWAN, *Circuit Judge:*

This is an action under §16b of the Fair Labor Standards Act, 29 USCA §216(b), to recover unpaid overtime compensation, liquidated damages and attorney's fees. It was commenced in the City Court of the City of New York, was removed by the defendant to the District Court, and was tried to the court without a jury upon an agreed statement of facts. The plaintiffs are employees of the defendant, a common carrier by motor truck of interstate freight, and the issues framed for trial were whether they were within the coverage of section 7 of the Act, 29 USCA §207, or were exempted therefrom by section 13(b)(1), 29 USCA §213(b)(1), as employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of §304 of Title 49." Because of doubt on the basis of the agreed facts whether the plaintiffs were subject to the jurisdiction of the Interstate Commerce Commission, the trial judge was of the opinion that decision should be held in abeyance in order that they might have an opportunity to apply to the Commission to fix their status. *Ispass* v. *Pyramid Motor Freight Corp.*, 54 F. Supp. 565. Thereafter the plaintiffs moved for a final disposition of the case, and the trial judge, treating the motion as an election not to apply to the Commission or to present further pleadings or proof, entered an order dismissing the complaint. 59 F. Supp. 341. From this judgment the plaintiffs have appealed.

Before passing to the merits we consider the appellee's motion to dismiss the appeal. The judgment was entered February 19, 1945. Notice of appeal was duly filed March 29th, but nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the district court or this court until July 20th, when an order was obtained from a judge of this court extending the appellant's time to file the record on appeal until September 1, 1945. On that date the record and the appellants' brief were filed. A motion by the

appellee to dismiss the appeal was denied from the bench in October and is now renewed. It is urged that under Rule 73(g) F. R. C. P. only the district court possesses jurisdiction to extend the time to docket an appeal and file the record on appeal. But Rule 73(a) provides that a party may appeal by filing with the district court a notice of appeal and that failure of the appellant to take further steps "does not affect the validity of the appeal, but is ground * * * for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Hence the jurisdiction of the appellate court attaches at the time of filing the notice of appeal and whether a dilatory appellant shall be allowed to proceed is a matter within its discretion. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. C.). In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment. The motion to dismiss is denied.

In construing section 304(a)(1) and (2) of Title 49 the Supreme Court has limited the regulatory power of the Commission to those employees whose activities affect the safety of operation of motor vehicles. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 553. But it is the existence, not the exercise, of the power that determines their exemption under section 213(b)(1) of Title 29. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. In *Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, the Commission ruled that "loaders" and "helpers", as well as drivers, of motor trucks are subject to its jurisdiction, because the way a truck is loaded affects the safety of its operation. The appellants contend that their activities bring them within this ruling. We must therefore consider the evidence, bearing in mind that the burden of proof is upon the defendant to show which, if any, of its employees

are within the exemption. *Helliwell v. Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Walling* v. *Comet Carriers*, 151 F. 2d 107, 110 (C. C. A. 2); *cf. Stratton* v. *Farmers Produce Co.*, F. 2d 825, 827 (C. C. A. 8).

Laying aside for the moment the case of the plaintiff Shapiro, the agreed statement as to the other plaintiffs is to the following effect: The defendant maintains a main terminal on West 11th Street and a sub-terminal on West 38th Street for the convenience of its customers in the Garment Center of New York City. In the case of north-bound (*i.e.*, incoming) trucks, as the helper on the truck pushes the freight packages over the tailboard they are received by the plaintiffs, who place them in the sub-terminal building, and later in the day deliver them to the various consignees by means of hand-trucks or flat trucks which they push. Sometimes the north-bound trucks by-pass the sub-terminal and stop along the curb in the Garment Center; in such cases the unloading is performed in the same manner as at the sub-terminal and the plaintiffs then deliver the packages by hand or hand-truck into the buildings in the Garment Center. In the case of south-bound (*i.e.*, out-going) trucks, some of the freight packages are picked up by the plaintiffs at the consignors' places of business and hand-trucked to the sub-terminal where the plaintiffs "physically load the freight packages into a waiting truck" which proceeds, when loaded, to the main terminal where a new driver is taken on for the journey to destinations south of New York. A down-town employee other than the plaintiffs' also takes part in loading the vehicles at the sub-terminal. Sometimes trucks for south-bound loadings take up stations on the public streets in the Garment Center where the plaintiffs bring the packages by hand or hand-truck; in such cases the part taken by the plaintiffs in loading consists in lifting the packages to the tailboard "and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with

the down-town employee, stack and pile the freight in the vehicle." All of the plaintiffs other than Shapiro generally walked between stopping points but occasionally in order to save time, rode upon the truck when it moved from one place to another in the Garment Center.

It seems clear that the unloading activities of the plaintiffs would not bring them within the jurisdiction of the Commission because after the down-town helper pushes the packages over the tailboard their effect upon the safety of operation of the truck ceases. On the other hand the plaintiffs' part in loading the trucks does concern safety of operation. Merely lifting the packages on to the tailboard may not; but when they stand inside the truck body and help the down-town employee to "stack and pile the freight in the vehicle," they act as "loaders" and would come within the Commission's jurisdiction if these duties occupied a substantial part of their time. In 28 M. C. C. at 131 the Commission said that "we *have concluded that* we should not assert jurisdiction as to employees who spend an unsubstantial part of their time in performing duties which affect the safety of operation of motor vehicles." It is not clear whether the Commission thought it lacked power to assert jurisdiction or in the exercise of discretion refused to assert power. We think the former is the correct view. See *Walling* v. *Comet Carriers*, 151 F. 2d 107, 111 (C. C. A. 2); *Levinson* v. *Spector Motor Service*, 389 Ill. 466, cert. granted 14 U. S. Law Week 3126. Upon this record the defendant has not carried the burden of showing that "loading" occupies a substantial part of the working time of the plaintiffs. Accordingly the judgment of dismissal must be reversed and the cause remanded for entry of judgment in their favor and for allowance of an attorney's fee.

As to Shapiro the stipulation states that he regularly and as a matter of fixed duty rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the main terminal. In

addition Shapiro devoted three and a half hours daily to inside office work at the sub-terminal. Since Shapiro rode the truck for a substantial part of his working time he is a "helper" within the Commission's ruling in 28 M. C. C. at pp. 135-6. As to him the judgment of dismissal is affirmed.

As to the other plaintiffs the judgment is reversed and the cause remanded. An allowance of $200 is awarded to the plaintiffs' attorney for services on the appeal.

Appendix "B"

Stipulation of Facts

Order

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Civil No. 20-145

[SAME TITLE]

Upon reading and filing the annexed consent of the attorneys for the respective parties hereto, it is

ORDERED that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I. That this is an action brought under, and by virtue of, the Fair Labor Standards Act, 1938, 29 U. S. C. A., sections 201-219.

II. The complaint contains six causes of action for wages alleged to be due plaintiffs from defendant. The complaint was subsequently amended by an order, based on a stipulation, to include the causes of action of two additional plaintiffs.

III. The defendant was engaged in "commerce", within the purview of section 3 of the Act.

IV. The plaintiffs were engaged in "commerce" or in the "production of goods for commerce" within the purview of section 3 of the Act.

V. The defendant did not pay the plaintiff any overtime compensation.

VI. The parties have entered into the following stipulation of facts which have been agreed to be the facts upon which this action is based:

"The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:

Item 1: The defendant is a common carrier of property for hire by a motor vehicle in interstate and foreign commerce. It operates approximately 190 motor vehicles. Its principal operations are those between Wilmington, Delaware, and Philadelphia on the South and New York City and the Metropolitan New York District on the North. It is so authorized to operate by the Interstate Commerce Commission under a certificate of public convenience and necessity. It is privileged to transport what are termed "commodities generally."

Item 2: The defendant's main terminal in New York City is on West 11th Street, Manhattan Island. For the purpose of better serving its numerous customers in what is known as the Garment Center of New York City, it has long maintained a sub-terminal at 323 West 38th Street at which northbound freight for delivery in the Garment Center has been brought and southbound freight originating in the Garment Center leaves.

Item 3: As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown helpers rode on the vehicles with the drivers to the 38th Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. As the downtown helper pushed the freight packages over the tailboards they were received by the plaintiffs, who then placed the freight packages in the sub-terminal building. Still later in the mornings the plaintiffs then delivered the packages to various consignees in the Garment Center, generally using for that

purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

During those same days other northbound trucks after first stopping at the West 11th Street main terminal to change a driver and receive a downtown helper, by-passed the West 38th Street sub-terminal and parked first at one place and then another alongside the curbs in the Garment Center. At those pl[illegible]s the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.

Item 4: In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was "picked up" for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: Some of the freight packages would be picked up by the plaintiffs at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs would also at the same time so load the vehicles.

Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs brought the packages by hand or by hand truck. The part which the plaintiffs took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

Item 5: As to all the plaintiffs other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal.

Item 6: For the purposes of this case and for this case only it is agreed that the work period of each plaintiff each week was 54 hours, except as to plaintiff Shapiro, whose work hours, it is agreed, was 58, in consideration of which each was employed at a fixed weekly wage.

It is further agreed that the foregoing constitutes a description of the entire duties of the plaintiffs."

VII. The hours worked by the plaintiffs and their regular weekly compensation are as shown in Exhibits 1-8 inclusive.

VIII. It is agreed that if the plaintiffs are entitled to recover, a reasonable attorney's fee shall be fixed by the Court.

IX. It is agreed that if plaintiffs are entitled to recover for overtime claimed due, plaintiffs are also entitled to recover double said amount as liquidated damages, in accordance with section 16 (b) of the Wage and Hour Act.

IT IS FURTHER ORDERED that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I. Plaintiffs contend that they are covered by the Fair Labor Standards Act of 1938, and particularly by section 7 (a) thereof.

II. Defendant contends that plaintiffs are not covered by the Act and are specifically exempt from the provisions of section 7 (a) by section 13 (b) (1) thereof.

This issue involves a mixed question of law and fact to be determined at the trial.

It is agreed by counsel for both parties and by the Court that the decisions of the Interstate Commerce Commission and the Interpretive Bulletins and other rulings of the Administrator under the Fair Labor Standards Act are not binding upon the Court, but shall be considered by the Court in the determination of the issues raised herein; the Court to give such rulings the consideration required of them by law.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

ORDERED that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 29th day of April, 1943.

JAMES ALGER FEE
U. S. D. J.

Notice of settlement of foregoing order is hereby waived, and consent to signing same is hereby made.

Dated: April 29, 1943.

(Sgd.) LEON E. SPIELVOGEL,
Attorney for Plaintiffs.

(Sgd.) CHARLES E. COTTERILL,
Attorney for Defendant.

Appendix "C"

Notice of Motion and Affidavit

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants,

against

PYRAMID MOTOR FREIGHT CORPORATION,

Defendant-Respondent.

SIR:

PLEASE TAKE NOTICE that upon the hereto annexed affidavit of DEANE RAMEY, sworn to the 19th day of July, 1945, and upon all other proceedings heretofore had herein, the undersigned will apply to one of the Judges of the Circuit Court of Appeals for the Second Circuit, at the Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1945 at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order extending the time within which the plaintiffs shall have to file in the office of

the Clerk of the said Court, the Record on Appeal herein, and for such other, further and different relief as to the said Court may seem just.

Dated: New York, July 19th, 1945.

Yours, &c.,

LEON E. SPIELVOGEL,
Attorney for Plaintiffs-Appellants
RAMEY & MCKELVEY,
of Counsel,
Office & P. O. Address,
501 Fifth Avenue,
Borough of Manhattan,
New York 17, N. Y.

To:

CHARLES E. COTTERILL, ESQ.,
Attorney for Defendant-
Respondent,
70 East 45th Street,
New York, N. Y.

Affidavit of Deane Ramey, Read in Support of Motion

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants

against

PYRAMID MOTOR FREIGHT CORPORATION,

Defendant-Respondent

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

DEANE RAMEY, being duly sworn, deposes and says:

That I am a member of the firm of RAMEY & MCKELVEY, appearing herein of counsel to LEON E. SPIELVOGEL, ESQ., the attorney of record for plaintiffs-appellants, and submit this affidavit in support of the within application that an order be made and entered herein, extending the appellants' time within which to perfect and file in this Court, the Record on Appeal by plaintiffs-appellants, from an order dated February 14, 1945, by HON. JAMES ALGER FEE, a United States District Judge for the District of Oregon, and filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 19th day of February, 1945, dismissing the complaint herein.

The action involved in this appeal, and which was originally commenced in the City Court of the City of New

York, County of New York, by the plaintiffs to recover from the defendant overtime wages and compensation under and pursuant to the provisions of the Fair Labor Standards Act of 1938, was, upon the petition of the defendant removed to the United States District Court for the Southern District of New York, after which time, and on or about the 21st day of April, 1943 it regularly came on for trial in the said United States District Court for the Southern District of New York before the said Hon. James Alger Fee, a visiting Judge from the District of Oregon, who was then sitting within this jurisdiction.

When the said action came on for trial as aforesaid, the Trial Court instead of proceeding with the matter in the regular prescribed course and hearing testimony in support of the allegations of the complaint and answer, either directed or suggested that the attorneys for the respective parties prepare and submit to the Court a stipulation setting forth an agreed statement of facts for use by the Court in reaching a determination as to the issues raised by the pleadings. This was done, and the said attorneys thereupon duly executed and submitted to Judge Fee a stipulation setting forth all of the facts and issues involved and which were substantially to the effect that the defendant, which is a domestic corporation, was engaged in business as a common carrier of property for hire by motor vehicles in intrastate and foreign commerce, and that in connection with its business it maintained its main terminal on West 11th Street, in the Borough of Manhattan, New York, N. Y. and a sub-terminal in the Garment Center at New York, N. Y.

The plaintiffs were employed by the defendant in the capacity of "push-cart boys" and their duties consisted primarily of meeting the defendant's trucks at its sub-terminal, receiving packages which had been transported by the defendant in interstate commerce, and thereafter and by means of hand trucks, delivering the same to the divers consignees of said packages. In addition thereto,

the plaintiffs picked up from divers manufacturers in the Garment Center, other parcels consigned to out-of-state consignees and likewise by the use of hand trucks delivered them to the defendant's trucks at its said sub-terminal.

In addition to the foregoing and among other things, the stipulation set forth an agreed statement of facts regarding the hours of employment and fixed the amount of the overtime wages to be paid to plaintiffs in the event the Trial Court decided that they were covered by the Fair Labor Standards Act.

This stipulation and the pleadings were thereupon submitted to the said Trial Judge who thereupon proceeded to reach a determination of the issues involved without any proof of any kind being offered, and thereafter and on or about the 29th day of November, 1943, Judge Fee wrote and filed a lengthy opinion which was to the effect that, inasmuch as the defendant was a motor carrier and under the jurisdiction of the Interstate Commerce Commission, the plaintiffs should be required to file with the Commission an application seeking a determination of their status as employees of the defendant, and a ruling to the effect that they either were, or were not under the jurisdiction of the Commission. The opinion fruther provided that the action was to be held open pending such application and determination.

Thereafter Mr. Spielvogel retained my firm as of counsel in the matter, and we immediately proceeded to take the matter up with Judge Fee by letter, due to the fact that he had returned to his home jurisdiction. After several letters had been exchanged between my office and Judge Fee, during the course of which I definitely indicated that the plaintiffs did not feel that the responsibility was theirs to seek a ruling before the Commission, and that they felt that they were entitled to a decision by the Court without such application, I caused a motion to be brought on before the United States District Court for the Southern District of New York on November 28th, 1944, whereby I

sought a final determination of the action based upon the papers which had been submitted to Judge Fee. The said Motion was referred to Judge Fee, who thereafter and on the 14th day of February, 1945 signed the said order above referred to dismissing the complaint. Thereafter, and on the 2nd day of April, 1945 I caused an appeal from the said order to be filed in the office of the Clerk of the United States District Court for the Southern District of New York. I then telephoned Charles E. Cotterill, Esq., the attorney for the defendant and asked him if he would enter into a stipulation settling the Record on Appeal. Mr. Cotterill stated to me that he would not enter into a stipulation of any kind, neither would he exchange any favors or courtesies as far as this particular case was concerned, and that in addition thereto he would place in my path every obstacle at his command. He made it very emphatic at the time that he was opposed to any further discussion of any kind regarding the matter, and asked me to refrain from any further request as far as the record on appeal was concerned. Following this telephone conversation, and on the 8th day of April, 1945, I served upon Mr. Cotterill a notice, pursuant to Rule 75 of the Federal Rules of Civil Procedure, setting forth and designating the papers and records which the plaintiffs intended to print and file with this Court as the Record on Appeal. On April 11, 1945 Mr. Cotterill served upon me a cross notice, which listed as a part of the Record on Appeal, the correspondence which I had conducted with Judge Fee as above referred to, as well as letters which he had written and another letter written by the Regional Attorney for the Wage and Hour Division. I did not feel that these letters constituted a part of the Record on Appeal, and I thereupon, and on the 24th day of April, 1945 caused a motion to be brought in the United States District Court for the Southern District of New York, for an order settling the Record on Appeal. This said Motion came on before Judge Clancy, who entertained some doubt as to the power

of the District Court to grant such a motion, and upon his suggestion I withdrew the said motion and took the matter up with the Clerk of this Court as to the method of procedure in view of Mr. Cotterill's refusal to stipulate as to the Record on Appeal, or extend any courtesy whatever in the matter. I was thereupon informed that in view of Mr. Cotterill's actions, it would be necessary for me to prepare and submit to the District Court typewritten copies of all the papers on file and obtain a certification thereof, and file same with the Clerk of this Court.

I immediately proceeded to follow these instructions, but I discovered that the file which Mr. Spielvogel turned over to me was incomplete and that a number of papers which were on file in the District Court were not delivered to me by Mr. Spielvogel. It thereupon became necessary to make long-hand copies of the said papers on file, and then have them typewritten for a proof reading and certification by the District Court. Without any fault or negligence on my part, or on the part of the plaintiffs, I encountered considerable inconvenience and delay in preparing such record. The delay in question was occasioned by reason of the time element involved in making the hand-written copies, and a further delay was caused due to the fact that after the complete record had been typed, a considerable portion or part thereof was inadvertently mislaid or lost, thereby necessitating a repetition of the work which had already been done. In addition to the foregoing, additional delay was occasioned by reason of the fact that my stenographer's Mother died while she was in the midst of preparing the record for a second time. This occurrence caused her to be absent from the office for a considerable period of time, and it became necessary for me to get someone else to do this work.

I finally succeeded in getting the typewritten copy prepared, and when I submitted it to the Clerk of the District Court on July 18, 1945 for certification, I was informed that the time within which to file the Record on Appeal had ex-

pired and that same had not been extended by stipulation, order, or otherwise. This information came as a surprise to me for the reason that I was under the impression that my partner and associate, to wit, Willian McKelvey, who has likewise actively participated in this case since we were retained, had applied to and obtained from the District Court an extension of time. I then questioned Mr. McKelvey about the failure to obtain such extension, and he stated that he was of the opinion that I had obtained such an extension. The only thing to which I can attribute this misunderstanding is the fact that during the time in question we were having some difficulty as far as Secretaries were concerned, and it became necessary to change them at short intervals. The failure to obtain such extension was purely inadvertent, and it has not in any manner whatever prejudiced the rights of the defendant. The plaintiffs have been aggrieved by the order herein appealed from, and I feel reasonably certain that such order will be reversed by this Court when the matter is formally presented.

In dismissing the complaint the Trial Court was in error, for the reason that it imposed upon the plaintiffs the obligation of proving that they did not come within the exemption provisions of the Fair Labor Standards Act, instead of imposing such duty upon the defendant.

As before stated, the typewritten record is now ready for certification by the District Court, and I am prepared to have the Record on Appeal printed and filed in this Court and prosecute the said appeal without further delay. I again repeat that the defendant has not been prejudiced, and greater harm and injury will result to the plaintiffs by the denial of this application than to the defendant by the granting of same.

That no previous application for the relief herein asked for has been made to any Court or Judge thereof.

WHEREFORE I pray that an order be made and entered herein, extending the time within which the plaintiffs may

file the Record on Appeal in the office of the Clerk of this Court, and I further ask that the period of such extension be fixed so as to afford the plaintiffs adequate opportunity of filing such record.

DEANE RAMEY

Sworn to before me this
19th day of July, 1945.
HYMAN W. SOBELL, Notary Public
N. Y. Co. Clk's No. 761, Reg. No. 1490-S-7
Kings Co. Clk's No. 202, Reg. No. 1027-S-7
Bronx Co. Clk's No. 114, Reg. No. 522-S-7
Commission Expires March 30, 1947